A **NG SAY CHUAN**

v.

LIM SZU LING

B HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM JC
[ORIGINATING SUMMONS NOS: S8-24-156-2008
& S8-24-143-2008]
18 MARCH 2010

C ***FAMILY LAW:*** *Children - Custody - Factors taken into account - Welfare of child - Wishes of parent and child - Rebuttable presumption in cases of child under age of 7 - Children to be brought up together - Law Reform (Marriage and Divorce) Act 1976, s. 88(2), (3)*

D ***FAMILY LAW:*** *Children - Custody and Maintenance - Interim order - Application to vary interim consent order - Whether exceptional circumstances shown - Whether material change in circumstances - Application for variation refused - Law Reform (Marriage and Divorce) Act 1976 s. 96*

E ***FAMILY LAW:*** *Children - Maintenance - Whose primary responsibility to maintain children - Children to be maintained at same standard of living as during existence of marriage - Law Reform (Marriage and Divorce) Act 1976, s. 92*

F The plaintiff/husband in this suit applied for the following orders: (i) that the interim order dated 15 January 2009 ("the interim order") be suspended or varied; (ii) that he stop paying interim maintenance of RM4,500 per month commencing April 2009; (iii) that the wife pay interim maintenance of RM5,000 a month to him; (iv) that he be given the care, custody and control ("custody") of
G the three children from the marriage; and (v) that reasonable access of the children be given to the wife. The interim order was a consent order where it was agreed that the custody of the three children be given to the wife with access given to the husband, and a monthly maintenance of RM4,500 per month be credited by the
H husband into the wife's bank account each month. The three children were two boys of ages ten and eight years respectively and a girl six year old girl. The husband claimed that he had been constructively dismissed and was unemployed for about ten months. He also claimed that his monthly expenditure was more than
I RM19,000 and his sole income was from the rental of RM4,100 per month from his house. Before he stopped work, he was earning about RM11,740 a month. The defendant wife contended that there

was a possibility that the husband was working and getting an income with one of his companies which was not disclosed by him. The wife also claimed that the husband had a balance of RM419,784.67 in his current account and was receiving income from a house in Melbourne and from being a shareholder and director of several companies.

Held (dismissing the application with costs):

(1) A consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court. Under s. 96 of the Law Reform (Marriage and Divorce) Act 1976 ("the Act") the court has the discretionary power to vary the interim order for custody or maintenance of the children if there is any "material change in the circumstances". (para 12)

(2) Under s. 92 of the Act, it is the duty of a parent to maintain his children, whether they are in his or her custody or the custody of any other person by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means or station in life or by paying the cost thereof. The husband has the primary responsibility, whereas the wife has a secondary responsibility, to maintain the children. (paras 15 & 16)

(3) From the husband's expenditure, it was clear that he was living quite luxuriously. It is morally and legally wrong for a father not to maintain his three children, ages ten, eight and six, when he is using his income, savings and resources to take care of himself solely, without any regard to his paternal and statutory duty to maintain his children. (para 24)

(4) The husband's claim for interim maintenance of RM5,000 a month from his wife was mischievous and vexatious. There was no divorce petition filed, so there was no question of the wife being ordered to pay maintenance to the husband. (para 28)

(5) The paramount consideration for determining custody under s. 88(2) of the Act shall be the welfare of the child even though the court shall have regard to the wishes of the parents of the child, and the wishes of the child where he or she is of an age to express an independent opinion. Regarding the girl, there is a rebuttable presumption under s. 88(3) of the Act, that the custody of any child below the age of seven years shall

A be given to the mother. The presumption in s. 88(3) has not been rebutted by the husband and therefore custody of this child should remain with the mother. (paras 29, 30, 31, 32, 33 & 34)

B **(6)** Regarding the custody of the three children as a whole, by virtue of the interim consent order, the husband had agreed, and the wife did have the custody of the children for the last one year. It was in the welfare and interest of the children to maintain stability in their lives. The children had, from birth, been used to the environment in the maternal grandmother's C home, having been cared for in that home during the day even when their parents were together and this continuity of care should be preserved. There was no reason to separate the three children as they had been always together. It was in the welfare and interest of the three children that they be brought up D together by the wife. (paras 35, 36 & 37)

(7) There was no material change in the circumstances to necessitate a variation of the interim order for maintenance and custody of the three children. (para 40)

E **Case(s) referred to:**
B Ravandran Balan v. Maliga Mani Pillai [1995] 1 LNS 21 HC ***(refd)***
K Shanta Kumari v. Vijayan [1985] 1 LNS 135 HC ***(refd)***
Lau Hui Sing v. Wong Chuo Yong [2008] 9 CLJ 232 HC ***(refd)***
Mahabir Prasad v. Pushpa Mahabir Prasad [1981] CLJ 174; [1981] CLJ (Rep) 182 HC ***(refd)***
F *Sivajothi K Suppiah v. Kunathasan Chelliah [2000] 3 CLJ 175 HC* ***(refd)***
Tan Chong Pay v. Tan Swee Boon [1997] 4 CLJ 625 HC ***(refd)***
Teh Eng Kim v. Yew Peng Siong [1977] 1 LNS 138 FC ***(refd)***
W v. H [1986] 2 CLJ 350; [1986] CLJ (Rep) 763 HC ***(refd)***
YCC v. LSY [2007] 7 CLJ 207 HC ***(refd)***

G **Legislation referred to:**
Law Reform (Marriage and Divorce) Act 1976, ss. 88(2), (3), 92, 93(1), (2), 96

For the plaintiff - LY Oon; M/s LY Oon & Assocs
For the defendant - YN Foo; M/s YN Foo & Partners

H

Reported by Amutha Suppayah

I

JUDGMENT

Yeoh Wee Siam JC:

[1] This is an appeal filed on 25 February 2010 by Ng Say Chuan, the plaintiff husband ("the husband") against my decisions made on 28 January 2010 in respect of the joint hearing of:

(a) Case No. OS S8-24-156-2008 regarding encl. 1 ("encl. 1");

(b) Case No. OS S8-24-143-2008 regarding encl. 15 ("encl. 15").

[2] I heard both parties regarding encl. 15 first, followed by encl. 1.

Enclosure 15

[3] This is an application by the husband for the following prayers:

(a) the interim order of the court dated 15 January 2009 ("the interim order") be suspended or varied;

(b) the husband stops paying interim maintenance of RM4,500 per month commencing April 2009;

(c) the wife pays interim maintenance of RM5,000 a month to the husband commencing April 2009;

(d) the husband be given the care, custody and control ("custody") of the three children from the marriage;

(e) reasonable access of the children be given to the wife;

(f) costs in the cause;

(g) any other relief as the court deems fit.

[4] The grounds for the application are as follows:

(a) the husband is now unemployed;

(b) the husband's monthly expenditure is more than RM19,000 per month whereas his sole income is from the rental of RM4,100 per month from his house. Therefore, the husband is unable to pay the interim maintenance of RM4,500 per month to the wife;

A (c) the husband now has free time to give his full attention to the children. Therefore, the custody of the three children should be given to the husband with reasonable access given to the wife.

[5] The husband submitted that he was constructively dismissed and was not working for about ten months now. Before he stopped B work, he was earning about RM11,740 a month. The husband now only has an income of RM4,100 per month from the rental of a house in Bukit Bandaraya.

[6] The defendant wife ("the wife") contended that it is C impossible for the husband not to work for nearly ten months. She stated that there is a possibility that the husband is working and getting an income with one of his companies, namely Penggiran Asia Sdn. Bhd. ("Penggiran") which was not disclosed by him. The husband has other sources an income, for example:

D (i) rent of RM4,100 per month from the Bukit Bandaraya house;

(ii) current account no. 21413800040059 in RHB Bank which has a balance of RM419,784.67 in January 2008. Until now the husband has not given any other evidence even though E challenged by the wife;

(iii) rent from the house in Melbourne;

(iv) the husband is a shareholder and director of several companies including Penggiran.

F

[7] The wife further contended that the husband is still maintaining a luxurious lifestyle including employing a domestic maid and a gardener, and using a car ie, Hyundai Trajet WJC 7890 and a second car ie, Mazda Premacy WLS 3689.

G **[8]** The interim order is a consent order entered into by the husband and wife where it was agreed that the custody of the three children be given to the wife with access given to the husband, and a monthly maintenance of RM4,500 per month be credited by the husband into the wife's bank account each month. It is not stated H whether the RM4,500 per month is for maintenance of the children or the wife but it can be safely concluded that it is maintenance for the children since there is no proof of any divorce proceedings being filed or a divorce being granted to warrant maintenance for the wife to be paid.

I

[9] After considering the submissions of both parties I made the following decision on encl. 15:

Prayers (a), (b), (c), (d) and (e): dismissed.

Prayer (f): costs to be borne by the husband.

[10] My grounds for the decision are as follows:

[11] Section 96 of the Law Reform (Marriage and Divorce) Act 1976 ("the Act") provides as follows:

> 96. Power for court to vary orders for custody or maintenance.
>
> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

[12] Bearing in mind again that the interim order is a consent order, it therefore must be honoured and complied with by both parties. As far as possible, a consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court (see *Lau Hui Sing v. Wong Chuo Yong* [2008] 9 CLJ 232). In this case, however, learned counsel for the wife informed the court that the husband has not complied with the interim order and has not paid the monthly maintenance agreed upon and has been in arrears of payment of RM45,000 up to the date of hearing. Applying s. 96 of the Act to the case, the court has the discretionary power to vary the interim order for custody or maintenance of the children if there is any "material change in the circumstances".

Whether There Is A Material Change In Circumstances Regarding Maintenance And Custody Of The Children

[13] Learned counsel for the husband, *inter alia*, submitted that the husband has been constructively dismissed and has been out of a job for ten months. That is why the husband has to apply for a variation of the interim order. Payment of the loan for his house in Taman Tun Dr. Ismail ("TTDI") is RM5,000 a month. The wife is a joint owner of the house and she is working, but the husband has to take out from his savings to pay for the loan. The husband is merely asking for a stay of the interim order.

[14] On the other hand learned counsel for the wife submitted that the husband, a qualified engineer, who was earning RM35,000 a month, was not dismissed by his employer, but instead abandoned his job and claimed constructive dismissal. The husband did not give proof of his efforts to find another job.

[15] Under s. 92 of the Act, it is the duty of a parent to maintain his children, whether they are in his or her custody or the custody of any other person by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means or station in life or by paying the cost thereof.

[16] It is trite law that the husband has the primary responsibility, whereas the wife has a secondary responsibility, to maintain the children (see also s. 93(1) and (2) of the Act).

[17] I note from the husband's affidavit that the wife earns about RM11,000 a month. I also note that in encl. 1 the wife is praying for a maintenance of RM15,598 per month for the children. The RM4,500 a month for maintenance of the children under the interim order is therefore less than one-third of what the wife is praying for.

[18] In this case, the husband has also admitted in his affidavit that even in the past he had never intended the wife to be the sole bread winner of the family. The husband does not dispute that he is receiving a steady monthly rental from the Bukit Bandaraya house. The wife has exhibited proof that the husband's current account in the RHB Bank had a balance of RM419,784.67. The wife contended that the husband is also receiving rental income from his Melbourne apartment.

[19] The husband has exhibited the details of his total monthly expenditure of RM19,192.51 (exh. C under exh. B of husband's affidavit in support of the application ("exh. C")) but he did not disclose his total assets.

[20] In *YCC v. LSY* [2007] 7 CLJ 207, Clement Skinner J stated as follows:

> First, the husband carries the evidential burden of satisfying the Court, on a balance of probabilities, that there is a material change of circumstances.

[21] In *Lau Hui Sing v. Wong Chun Yong (supra)*, the court dismissed an application made by the ex-husband seeking an order for the wife to contribute maintenance for the three children on the ground that the ex-husband had not disclosed his assets, movable and immovable.

[22] From the husband's statement of income and liabilities (exh. C), the husband's only income is RM4,100 from the rental of the Medang Kapas house. However, his nett expenses are RM19,192.51. He therefore has a deficit of RM15,092.51 a month? The question that the husband did not answer is, where did he manage to get the money to cover his extra expenses of RM15,092.51 a month? He stated that he had to use his savings to pay for his expenses, but he did not disclose what are his savings. He did not show proof that the RM419,784.67 in his RHB Bank account is no longer available, which means such monies are still at his disposal. That being the case, it is clear that the husband does have the means to pay the monthly maintenance of RM4,500 under the interim order.

[23] The husband did not rebut the wife's allegation that he was collecting rent from his Melbourne apartment. The logical deduction is that he does have such rental income from such apartment.

[24] From exh. C, the husband spends RM500 on clubs, RM200 on a gardener, RM350 on a part-time maid, RM4,000 on personal expenses, RM1,200 on groceries and household items, RM1,014.23 on utilities and other expenses. From the husband's expenditure, it is clear that he is living quite luxuriously, more so when he does not deny that he has two cars. He admitted that he even had a driver. It is morally and legally wrong for a father not to maintain his three children, ages ten, eight and six, when he is using his income, savings and resources to take care of himself solely, without any regard to his paternal and statutory duty to maintain his children. He does not appear to have made any efforts to cut down on his expenses or lifestyle or to tighten his belt. He could have liquidated some of movable or immovable assets but he did not do so. Out of the husband's total expenses of RM19,192.51 per month, only RM4,158 is for the children's Sri Cempaka school fees, but the balance of RM15,034.51 is for the husband's personal expenditure or commitments.

[25] With such a high expenditure every month, the husband should have been more careful in claiming constructive dismissal from a job that pays him RM35,000 a month. Constructive dismissal is not a direct dismissal by the employer. Constructive

dismissal is one where the employee leaves his job or employment claiming that the employer has breached his contract of employment in a fundamental manner and the employee gives notice to the employer that he is claiming constructive dismissal on that ground. Here, learned counsel for the wife submitted that the husband deliberately and irresponsibly created his current jobless situation by walking out on his job when he was not even directly dismissed by his employer (see letter from U-mobile dated 26 March 2009, exh. "LSL 2" to wife's affidavit on 14 May 2009).

[26] The husband should have thought twice before initiating his constructive dismissal, bearing in mind that he has his moral and legal duty to maintain his children. It is common knowledge that one need not be dismissed if the employer did not take any direct steps to dismiss him. Thus, one can time one's own constructive dismissal or decide not to claim it at ll. The husband therefore cannot walk out on his job, show no proof of his efforts to look for a job in the last ten months and then applies to this court to suspend the interim order and stop payment of maintenance for the three children.

[27] The husband also did not deny the wife's allegation that he is now working in one of his own companies, Penggiran.

[28] As for the husband's claim for interim maintenance of RM5,000 a month from his wife, I am of the opinion that this is mischievous and vexatious. There is no divorce petition filed, so there is no question of the wife being ordered to pay maintenance to the husband.

[29] As for the husband's application for custody of the three children on the ground that he now has time to take care of them, I state here that the paramount consideration for determining custody under s. 88(2) of the Act shall be the welfare of the child even though the court shall have regard to the wishes of the parents of the child, and the wishes of the child where he or she is of an age to express an independent opinion.

[30] The three children are two boys of ages ten and eight years respectively, and a girl of age six years ie, their current ages.

[31] Regarding the girl, there is a rebuttable presumption under s. 88(3) of the Act, that enhances the natural law, that the custody of any child below the age of seven years shall be given to the mother.

[32] Section 88(3) of the Act provides as follows: A

> 88.(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. B

[33] There is a long line of authorities deciding that the mother should be entitled to custody of a child during what is called the period of nurture, until the child attains seven years (see *K Shanta Kumari v. Vijayan* [1985] 1 LNS 135, *W v. H* [1986] 2 CLJ 350; [1986] CLJ (Rep) 763, *B Ravandran Balan v. Maliga Mani Pillai* [1995] 1 LNS 21, *Teh Eng Kim v. Yew Peng Siong* [1977] 1 LNS 138, *Sivajothi K Suppiah v. Kunathasan Chelliah* [2000] 3 CLJ 175, *Tan Chong Pay v. Tan Swee Boon* [1997] 4 CLJ 625 and *Mahabir Prasad v. Pushpa Mahabir Prasad* [1981] CLJ 174; [1981] CLJ (Rep) 182). C D

[34] On the facts, regarding the six year old girl, Claire, the presumption in s. 88(3) has not been rebutted by the husband and therefore custody of this child should remain with the mother. E

[35] Regarding the custody of the three children as whole, as submitted by learned counsel for the wife, by virtue of the interim consent order, the husband had agreed, and the wife did have the custody of the children for the last one year. I considered the undesirability of disturbing the lives of these children by a change of custody. It is in the welfare and interest of the children to maintain stability in their lives. F

[36] The children have, from birth, been used to the environment in the maternal grandmother's home, having been cared for in that home during the day even when their parents were together and this continuity of care should be preserved. G

[37] There is no reason to separate the three children as they have been always together. It is in the welfare and interest of the three children that they be brought up together by the wife. H

[38] Both husband and wife have alleged infidelity or adultery on each other's part. It appears that the marriage has suffered bad blows from it. Based on whatever is disclosed in the affidavits of both parties, I do not think that the welfare of the children would be adversely affected or jeopardized if custody is given to the mother. I

[39] As for the husband's present situation of being unemployed, it is merely temporary and does not justify a new order by this court to hand over the custody of the children to him since there is a real possibility of him getting a job soon, after which he may not have time to take care of the children anymore.

[40] For the above reasons I am satisfied that there is no material change in the circumstances to necessitate a variation of the interim order for maintenance and custody of the three children. Accordingly, I dismissed the application in encl. 15 with costs.

Enclosure 1

[41] The application in encl. 1 was filed by the plaintiff wife ("the wife") for the following orders:

(a) The wife is to be given the sole rights for care, custody and control ("custody") of the three children of the marriage ie, Nigel Ng Chong Wui (boy, nine years old), Nicholas Ng Chong Hau (boy, seven years old) and Claire Ng Kim Yuen (girl, five years old) (Note: the ages of the children stated here are their ages at the time of filing of the application);

(b) The defendant husband ("the husband") be given reasonable access;

(c) The husband pays maintenance of RM15,958 per month for the children;

(d) The husband pays for all education expenses of all the children;

(e) The husband pays for all the medical and dental costs of the said children; and

(f) The husband pays for all the costs of these proceedings.

The grounds for the application (encl. 2) are as follows:

(a) The husband is having an affair with a woman called Caroline Kan Sau Lai.

(b) The husband had abandoned his responsibility towards the wife and children.

(c) In the interest and for the welfare of the children, the wife had to leave the matrimonial home.

(d) In the interest and for the welfare of the children, the wife should be given custody of the said children.

(3) The husband is a person of means.

[42] The husband filed an affidavit in reply (1) on 14 January 2009 (encl. 4) and, *inter alia*, stated:

(a) The breakdown of the relationship between the husband and wife resulted from the dishonesty of the wife who had an affair with another man.

(b) The wife is addicted to smoking and mahjong, and does not know how to cook, and this has jeopardized the lives of the children.

(c) The husband is ready to take care of the children because he is able, and has a domestic maid and a personal driver.

[43] Both learned counsels adopted the same written submissions that they had filed for encl. 15.

[44] Accordingly, I made the following decision on encl. 1:

Prayers 1 and 2	:	Allowed
Prayer 3	:	Dismissed. The original maintenance of RM4,500 per month for the three children is maintained.
Prayers 4 and 5	:	The husband is to pay 50% of all costs for the education, and medical and dental treatment of the 3 children.
Prayer 6	:	Costs to borne by the respective parties.

[45] My decision for encl. 1 is consequential upon my considerations and decision for encl. 15. My grounds of judgment for encl. 1 are the same as those for encl. 15. That being the case, my grounds of judgment for encl. 15 above are to apply *mutatis mutandis* here.